No. 13119

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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PEOPLE OF THE STATE OF CALIFORNIA and MAURICE C. SPARLING, as Superintendent of Banks of the State of California,

*Appellants,*

*vs.*

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION,

*Appellee.*

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**On Appeal From the United States District Court for the Southern District of California. Central Division**

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## BRIEF FOR APPELLEE.

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MISCELLANEOUS

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## BRIEF FOR APPELLEE.

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### Opinion of the District Court.

The opinion of the District Court appears at R. 105 and is reported in 98 Fed. Supp. 311.

### Jurisdictional Statement.

This action involves an interpretation of 12 U. S. C. 1464 and other statutes relating to Federal savings and loan associations. Because the Plaintiffs contend that state statutes imposing operational requirements in conflict with those imposed by Federal law and regulations are constitutionally applicable to Federal savings and loan

associations, this action also involves Article I, Section 8 of the Constitution of the United States. It was removed from the State Courts to the United States District Court. This Court has jurisdiction of the appeal pursuant to 28 U. S. C. 1291.

## Statement of the Case.

The testimony, and Stipulation of Facts, which Appellee "Coast Federal Savings and Loan Association of Los Angeles" views differently than do the Appellants in their Statement of the Case (Op. Br. p. 4), are discussed in full in the Argument, *infra,* Part II, B, beginning at page 23. In general, the Complaint charges the Appellee Coast Federal with transgressing former Sections 12 and 12a, Act 652, Deering's Cal. Gen. Laws (and the codification of those sections effective less than three weeks before the filing of the Complaint) in two general ways, (1) in that Coast Federal allegedly "solicited and received deposits and transacted business in the way and manner of a bank and savings bank" [R. 16] and (2) in Coast Federal's advertising. The Answer [R. 24] denies the allegations of the Complaint except as to the use of certain phrases and signs, discussed in detail, *infra.*

After trial, the District Court rendered final judgment in favor of the Defendant-Appellee Coast Federal Savings and Loan Association of Los Angeles.

While the Appellee views the facts differently than the Appellants, Appellee must object that the Appellants' Statement of the Case makes assertions that do not even purport to be substantiated in the record. By way of example is the Appellants' unwarranted parenthetical insertion, completely without record substantiation, regarding Coast Federal's advertising, Opening Brief, page 5, first

line. Other statements completely without record basis appear at several places in Appellants' Statement of the Case. These statements are not only without basis in the record, they are not in accord with the facts.

## Statutes Herein Involved.

Codification of Sections 12 and 12a, Act 652, Deering's Gen. Laws, in the Banking Code was effective three weeks before this action was filed. The Appellants' Brief (Op. Br. p. 9) sets out the statute after codification. Sections 12 and 12a, and related Sections 1.02, 12.01 and 12.03, of Act 986, Deering's Gen. Laws, are here set out for the convenience of the Court.

Act 652, Deering's Gen. Laws:

"Sec. 12: *Unauthorized pretensions of doing banking business forbidden: Use of word 'bank,' 'trustee,' etc.: Application of rule to building and loan associations: Penalty for violations: Injunction.* No person, firm, company, co-partnership or corporation, either domestic or foreign, not subject to the supervision of the superintendent of banks, and not required, by the provisions of this act, to report to him, and which has not received a certificate to do a banking business from the superintendent of banks, shall advertise that he or it is receiving or accepting money or savings, and issuing notes or certificates of deposit therefor, or shall make use of any office sign, at the place where such business is transacted, having thereon any artificial or corporate name, or other words indicating that such place or office is the place or office of a bank or trust company, that deposits are received there or payments made on check, or any other form of banking business transacted, nor shall any such person or persons, firm, company, co-partnership or corporation, domestic or foreign, make

use of or circulate any letter-heads, billheads, blank notes, blank receipts, certificates or circulars, or any written or printed, or partly written and partly printed, paper, whatever, having thereon any artificial or corporate name or other word or words indicating that such business is the business of a bank, savings bank or trust company; nor shall any such person, firm, company, copartnership or corporation, or any agent of a foreign corporation not having an established place of business in this state, solicit or receive deposits or transact business in the way or manner of a bank, savings bank or trust company, or in such a way or manner as to lead the public to believe that its business is that of a bank, savings bank or trust company.

*"Use of words 'bank,' 'trust,' etc.: Application of rule to building and loan associations.* Nor shall any person, firm, company, copartnership or corporation, domestic or foreign, not subject to the supervision of the superintendent of banks, and not required by the provisions of this act to report to him, and which has not received from the superintendent of banks a certificate to do a banking business, hereafter transact business under any name or title which contains the word 'bank' or 'banker' or 'banking' or 'savings bank' or 'savings' or 'trust' or 'trustee' or 'trust company,' and which indicates that such business is the business of a bank or trust company; provided, that this section shall not apply to the corporate name of any building and loan association now or heretofore doing business in this state; provided, that any building and loan association having in its corporate name words not clearly indicating the nature of its business shall, on all signs, letterheads and advertising matter, state 'This is a building and loan association' or words to that effect; and provided, further, that any build-

ing and loan association may borrow money, issue investment certificates or evidences of indebtedness, stating the rate of interest and terms and conditions of repayment, and do such other business as may be authorized by the laws of the state relating to building and loan associations; and provided, further, that no such association shall advertise or hold itself out to the public as a savings bank.

"*Penalty for violations: Injunction.* Any person, firm, company, copartnership or corporation, domestic or foreign, violating any provision of this section shall forfeit to the state one hundred dollars a day for every day or part thereof during which such violation continues. Upon action brought by the superintendent of banks the court may issue an injunction restraining any such person, firm, company, copartnership or corporation from further using such words in violation of the provisions of this section or from further transacting business in such a way or manner as to lead the public to believe that its business is that of a bank, savings bank or trust company during the pendency of such action and for all time and may make such other order or decree as equity and justice may require."

"Sec. 12a: *Prerequisites to advertising as bank: Forfeiture for violation of statute: Restraining violations: Manner of transacting business: Application of rule to building and loan associations.* Every person, firm, company, co-partnership or corporation, domestic or foreign, advertising that he or it is receiving or accepting money or savings, and issuing notes or certificates of deposit therefor or advertising that he or it is transacting the business of a bank, savings bank or trust company, or making use of any office sign at the place where such business is transacted, having thereon any artificial or corporate

name, or other words indicating that such place or office is the place or office of a bank or trust company, or that deposits are received there or payments made on check(s), or that interest is paid on deposits, or that certificates of deposit, either with or without interest are being issued, or that any other form of banking is transacted, and every person, firm, company, copartnership or corporation, domestic or foreign, making use of or circulating any letter-heads, bill-heads, blank notes, blank receipts, certificates or circulars, or any written or printed, or partly written and partly printed, paper, whatever, having thereon any artificial or corporate name, or advertising that such business is the business of a bank, savings bank or trust company, must have the proper capital stock paid in and set aside for the purpose of transacting such business, and must have received from the superintendent of banks, as provided for in this act, a certificate to do a banking business.

"*Forfeiture for violation of statute.* Any person, firm, company, copartnership or corporation, domestic or foreign, violating any provision of this section shall forfeit to the state one hundred dollars a day for every day or part thereof during which such violation continues.

"*Restraining violations.* Upon action brought by the superintendent of banks the court may issue an injunction restraining any such person, firm, company, copartnership or corporation from further violating any provision of this section, and may make such further order or decree as equity and justice may require.

"*Manner of transacting business.* Every person, firm, company, copartnership or corporation doing any of the things or transacting any of the business

defined in this section, must transact such business according to the provisions of the bank act, and the superintendent of banks or his deputy or examiners shall have authority to examine the accounts, books and papers of every such person, firm, company, copartnership or corporation, domestic or foreign, in order to ascertain whether such person, firm, company, copartnership or corporation has violated or is violating any provisions of this section;

"*Application of rule to building and loan associations.* Provided, that this section shall not apply to the corporate name of any building and loan association now or heretofore doing business in this state; and provided, further, that any such association having in its corporate name words not clearly indicating the nature of its business shall, on all signs, letterheads and advertising matter, state: 'This is a building and loan association' or words to that effect; and provided, further, that any building and loan association may borrow money, issue investment certificates or evidences of indebtedness, stating the rate of interest and terms and conditions of repayment, and do such other business as may be authorized by the laws of the state relating to building and loan associations; and provided, further, that no such associations shall advertise or hold itself out to the public as a savings bank."

Act 986, Deering's Cal. Gen. Laws:

"Sec. 1.02. *Building and loan association.* The term 'building and loan association' is hereby defined to mean any incorporated institution which shall have been incorporated to conduct, or shall be engaged in conducting, the business of receiving and lending money in accordance with the provisions of this act or shall have heretofore been incorporated to conduct

the business of receiving and lending money in accordance with the provisions of any act or acts, or part or parts of any act or acts, of which this act is a continuation or amendment."

"Sec. 12.01. *Restriction on Building and Loan Business.* No person, firm, co-partnership, association, company or society, either domestic or foreign, except a corporation, shall conduct or carry on in this State the business of accumulating the savings of its shareholders, stockholders, members or investors, and of loaning such accumulations in the manner of building and loan associations; and no corporation shall conduct or carry on such business except in accordance with the provisions of this act. This act shall not apply to investment companies except in the case of investment companies which shall also be building and loan associations as defined in section 1.02 of this act."

"Sec. 12.03. *Restrictions on name 'building and loan.'* No person, firm, co-partnership, association, company, society or corporation, either domestic or foreign, unless the lawful holder of a license to transact business in this state issued by the commissioner and then in force, nor unless actually engaged in carrying on a building and loan business in this state, shall hereafter transact business in this state under any name or title which contains the term 'building and loan' or 'building-loan' nor use any sign or circulate or use any letter-head, billhead, circular or paper whatever or cause to be published any advertisement which indicates that his or its business is the character or kind of business carried on or transacted by an association, or which is calculated to lead the public to believe that his or its business is that of an association. Any violation of any of the provisions of this section shall constitute a misdemeanor

or (*sic*) punishable by a fine of not exceeding five hundred dollars or by imprisonment in the county jail for not exceeding ninety days or by both such fine and imprisonment. Upon action brought by the commissioner, any court of competent jurisdiction may issue an injunction restraining any person, firm, copartnership, association, company, society or corporation from continuing to violate any provision of this section."

## Summary of Argument.

I.

The judgment below for the Defendant should be affirmed because Section 12 and Section 12a, Act 652, Deering's Cal. Gen. Laws, on which the Complaint is rested, never were intended by the California Legislature to apply to Federal credit activities.

Sections 12 and 12a by their terms apply only to such corporations as are "domestic or foreign." Federal savings and loan associations are neither domestic nor foreign, but federal, or national. Accordingly, 12 and 12a are not intended to apply to Federal savings and loan associations.

There is no more reason to apply Sections 12 and 12a (enacted in 1909 and 1911, respectively) to Federal savings and loan associations, first authorized in 1933, than to Federal Reserve Banks, Federal Home Loan Banks, or Federal Land Banks, for example. So applied, Sections 12 and 12a would prevent these Federal institutions even now from publicly displaying their own corporate names. The sections would prevent these institutions, and others such as the Reconstruction Finance Corporation, as well as Federal savings and loan associations, from performing their proper functions in California.

To apply Sections 12 and 12a to these Federal corporations, including Federal savings and loan associations, would be both unreasonable and in direct conflict with California's consistent legislative, administrative and judicial policy over many years, as well as with statutes *in pari materia*. Section 12.11, Act 986, for example, says that when an association becomes a Federal savings and loan association, "such association shall cease to be supervised by this State."

Reasonable and constitutional interpretations are favored.

II.

In addition, however, nothing the Appellee Coast Federal has done would violate the statutes.

The Appellants do not contend that the Court below erred in any of its findings of fact, and accordingly concede that the "defendant was actually transacting its business * * * strictly within the limited perimeter of its expressly authorized field." Nor do Appellants, in their "Statement of Points Upon Which Appellant Intends to Rely * * *" allege that the Court below erred in failing to find a single factual violation of Section 12 or Section 12a. An analysis of the record shows that no finding of such a violation could have been based on the evidence.

III.

Since California Bank Act sections 12 and 12a do not apply to Federal savings and loan associations, we do not have to reach the question of whether California would have violated the Federal Constitution if the sections did apply, which is the only question the Appellants argue in their Opening Brief. However, it is clear that if a state wanted to apply the provisions of 12 and 12a to a Federal, it could not be done.

A state cannot prevent the Federal Reserve Banks, the Federal Home Loan Banks, the Federal Land Banks and the Federal Intermediate Credit Banks from calling themselves "banks." It cannot prevent any of these, or Federal savings and loan associations, or the Reconstruction Finance Corporation, from performing the precise functions and using the exact phraseology directed by the Federal Government, nor could it even impose sanctions on these under the guise of supplementing Federal supervision.

Uniformity in structure, supervision and operations, including the use of uniform descriptive terms in advertising of Federal savings and loan associations, has great practical merit. But apart from its merit, uniformity is a mandate of Congress for Federal savings and loan associations (in which respect Federals differ from national banks) which must be honored by the courts. This uniformity would be destroyed if even one state could apply provisions like 12 and 12a to Federals. As a matter of fact, however, 12 and 12a would impose discriminatory burdens on Federals that would frustrate the purposes of their creation.

## IV.

The Court below properly held that whether a Federal savings and loan association, conceded to be operating within its prescribed field, is accomplishing its assigned functions, is for initial determination by the Home Loan Bank Board, which must apply the standard of the "best practices" of local mutual thrift and home financing institutions in the United States.

The courts will not make such an initial administrative decision that must be based on an "intuition of experience." (*Chicago, B. & Q. R. Co. v. Babcock,* 204 U. S. 585, 598.)

## ARGUMENT.

### I.

### The Statutes on Which the Complaint of the Appellants Rests Are, as a Matter of State Construction, Not Applicable to Federal Savings and Loan Associations or to the Appellee.

This case was tried in the District Court, testimony was taken and a final judgment rendered in favor of the Defendant-Appellee both on the facts and on the law. The entire case of the Appellants rests on their allegation that the Coast Federal Savings and Loan Association of Los Angeles has violated certain provisions of the California statutes (Secs. 12 and 12a, Act 652, Deering's Cal. Gen. Laws) set forth in the complaint which provide for the forfeiture of $100.00 per day for transacting, or advertising the transaction of, certain business activities and for an injunction in an action to be brought by the Superintendent of Banks. Accordingly, unless the statutes set forth in the Complaint apply to the Appellee Coast Federal and unless the Coast Federal has violated them, the Appellants have no cause of action, and this appeal must be dismissed.

Sections 12 and 12a, Act 652, Deering's Cal. Gen. Laws, codified first in the Banking Code and later in the Financial Code,[1] and on which this action is attempted

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[1]The Complaint in this action was filed October 20, 1949. The Banking Code was adopted June 24, 1949, to be effective October 1, 1949. The alleged overemphasis by the Coast Federal of the word "Bank" in the phrase "Member Federal Home Loan Bank," complained of in the action if any there were, is conceded to have been corrected on March 1, 1949. The other matters testified to by Appellant Commissioner Sparling, as well as all those matters set forth in the Stipulation, except the use of the shortened name "Coast Federal Savings" and possibly the advertising in the Octo-

to be founded, were in existence long before the enactment of the Federal statute which authorizes the creation of the Defendant-Appellee and other Federal savings and loan associations.[2] Except to the extent of the codification in 1949 and recodification in 1951, these sections have not been amended during the period of existence of Federal savings and loan associations. Necessarily, therefore, whether or not the State Legislature intended these provisions to apply to Federal savings and loan associations is, as a factual matter, beyond satisfactory answer. As a matter of statutory construction, however, it is clear that the statutes are not applicable to these units of the new Federal system created by the Congress after Sections 12 and 12a of Act 652 were already yellow on the state books.

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ber issue of the "Coast Federal Challenger," occurred if at all before October 1, 1949. The Complaint sets forth both the Banking Act sections and the superseding sections of the Banking Code. The Financial Code, except for Division 2 thereof which relates to building and loan associations, became effective September 22, 1951, and seems to have been intended principally as a restatement of existing statutory provisions (Financial Code, Sec. 2). Unlike the Banking Code, the Financial Code, in Division 2, includes the provisions of the acts relating to building and loan associations found in the General Laws, to be operative on the 91st day after the adjournment of the 1953 regular meeting of the legislature.

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[2]Federal savings and loan associations were authorized by the Home Owners' Loan Act of 1933. Section 12, Act 652, Deering's Cal. Gen. Laws, was first enacted in 1909 (Stats. 1909, p. 89), and was amended in 1911 (Stats. 1911 (Ex. Sess.), p. 115), in 1913 (Stats. 1913, p. 141), and 1929 (Stats. 1929, p. 443). Section 12a was added in 1911 (Stats. 1911, p. 1008), and amended the same year (Stats. (Ex. Sess.) 1911, p. 116) and in 1913 (Stats. 1913, p. 143). An exception for building and loan associations was first added in 1911 (Stats. 1911 (Ex. Sess.), p. 116).

**A. Sections 12 and 12a Are by Their Terms Not Applicable to Federal Corporations.**

Sections 12 and 12a are applicable to any "person, firm, company, co-partnership or corporation, *either domestic or foreign*" (emphasis supplied). The California Code (Corp. Code, Sec. 106) defines a domestic corporation as "a corporation formed under the laws of this state" and (Sec. 6201) a foreign corporation as "a corporation not organized under the laws of this state." A federal or national corporation, while of course not "formed under the laws" of California, the test of a domestic corporation, is nevertheless not a "foreign corporation." (*Home Owners' Loan Corporation v. Gordon*, 97 P. 2d 845, 36 Cal. App. 2d 189.) This is in accord with the holdings of the states generally, in interpreting their respective statutes, that a corporation created by the Federal government pursuant to its general power (*i. e.*, not by Congress sitting as the local legislature for a territory or the District of Columbia) is neither a domestic nor foreign corporation, particularly if a contrary interpretation would render the state statute unconstitutional. (*Homan v. Connett,* 152 S. W. 2d 1053, 348 Mo. 244; *Bezat v. Home Owners' Loan Corporation,* 98 P. 2d 852, 55 Ariz. 85; *Home Owners' Loan Corporation v. Stookey,* 81 P. 2d 1096, 59 Ida. 267; *Severson v. Home Owners' Loan Corporation,* 88 P. 2d 344, 184 Okla. 496; *Jeffreys v. Federal Land Bank of New Orleans,* 189 So. 557, 238 Ala. 97; *Home Owners' Loan Corporation v. Sherwin,* 18 N. E. 2d 992, 59 Oh. App. 567, appeal dism. *Home Owners'*

*Loan Corporation v. Welsh,* 17 N. E. 2d 270, 134 Oh. St. 356; *Leggett v. Federal Land Bank,* 167 S. E. 557, 204 N. C. 151, 88 A. L. R. 871; 20 C. J. S. (Corporations), Sec. 1785, p. 11; 23 Am. Jur., Secs. 8, 9 and 10, p. 21, *et seq.;* and Secs. 138 *et seq.,* p. 137 *et seq.;* Anno. 88 A. L. R. 873, 121 A. L. R. 122.)

**B. Any Other Construction of Sections 12 and 12a Would Be Unreasonable and Would Cause the Sections to Be Unconstitutional. The Courts Favor Reasonable Over Unreasonable Constructions, and Constructions That Sustain the Constitutionality of Statutes Over Constructions That Render Them Unconstitutional.**

Sections 12 and 12a must be interpreted as not applicable to Federal banking activities generally. Except that their application to corporations is limited to foreign and domestic corporations, which, as above discussed, do not include Federal corporations, Sections 12 and 12a carry no specific exemption for any Federal banking activities, either those in existence at the time of their enactment in 1909 and 1911 or any to be later created. Long after these California provisions were on the statute books, Congress from time to time caused new Federal banking activities and corporations to come into existence. Even as to some of the most omnipresent and now already venerated of these, California has never stated specifically the non-application of Sections 12 and 12a. Possibly the Appellants may concede that the Federal Reserve Bank of San Francisco, the Federal Reserve System's regional bank for its 12th District, is not subject to the supervision of the Appellant California Superintendent of Banks, is not required by Act 652 to report to him and needs no certificate from him to do

business in the State. But Sections 12 and 12a provide that a domestic or foreign corporation not subject to the Plaintiff-Superintendent's supervision, and not required to report to him, and which has not received a certificate to do a banking business from him, may not do a banking business and may not have a sign at either its home office in San Francisco or its branch office in Los Angeles "indicating that such place or office is the place or office of a bank" or indicating "that deposits are received there or payments made on checks, or any other form of banking business transacted." So the very name, "Federal Reserve Bank of San Francisco" would be a violation of the law.

The particular venture of the Federal government into the field of savings and of credit extension and regulation with which this action is concerned is the depression-born Federal Home Loan Bank System, the district reserve banks for which are the Federal home loan banks (12 U. S. C. 1421). Nothing in the California statute books and certainly no specific exemption in Sections 12 and 12a tells us in so many words that the provisions of Sections 12 and 12a do not operate so as to outlaw the Federal Home Loan Bank of San Francisco, the regional reserve credit institution for the 11th District, of which all Federal savings and loan associations in that district must be members (12 U. S. C., 1464(f)). Elsewhere in the statutes, however, as it has in the case of many other Federal banking and credit corporations, California recognizes the existence of the Federal home loan banks and attempts to facilitate the extension of their benefits to its people and to its own instrumentalities (Act 986, Sec. 9.06, Deering's Gen. Laws; Cal. Fin. Code, Secs. 754, 1353). It would, indeed, take a stretch of the imagination

so to interpret Sections 12 and 12a of Act 652 that the Federal Home Loan Bank of San Francisco may not, without violating the state law, call itself the "Federal Home Loan Bank of San Francisco," or engage in the precise banking functions that are specifically prescribed by Congress. In addition, such an interpretation would create a conflict between Sections 12 and 12a on the one hand, and on the other hand, the provisions of California law which recognize the operations of the Federal Home Loan Bank. Nor is it reasonable to conclude that the State Legislature in 1909 intended to restrict or prohibit altogether the activities of all corporations that Congress might thereafter create and assign some banking functions, or a banking name. To list some of these, subsequently created, which either could not use their corporate names in California under such an interpretation, or perform or advertise certain of their functions in that State, are the Federal Land Banks (12 U. S. C. 672), Federal Intermediate Credit Banks (12 U. S. C. 1021), National Farm Loan Associations (12 U. S. C. 711), Federal National Mortgage Association (12 U. S. C. 1716), the Reconstruction Finance Corporation (15 U. S. C. 601), and for that matter the two national deposit and savings insurance corporations, the Federal Deposit Insurance Corporation (12 U. S. C. 1811) and the Federal Savings and Loan Insurance Corporation (12 U. S. C. 1724). The reasonable construction that California in 1909 and 1911 did not intend Sections 12 and 12a to apply to the Federal government and its instrumentalities is favored to avoid these unreasonable consequences (Cal. Civ. Code, Sec. 3542; *Kashevaroff v. Webb* (1946), 73 Cal. App. 2d 177, 166 P. 2d 306. "* * * (I)t will not be supposed that the Legislature intended

any unreasonable consequences unless the language is so clear as to admit of no doubt," 23 Cal. Jur., Stats., Sec. 104, citing *Knox v. Wood,* 8 Cal. 542, 547; *Alameda Co. v. Kuchel,* 32 Cal. 2d 193, 195 P. 2d 17).

A California statute which so undertook to prohibit Constitutional Federal activities in California would, of course, be unconstitutional. See discussion, *infra,* Part III. The Courts prefer interpretations that uphold the constitutionality of statutes over those that would render them unconstitutional. (23 Cal. Jur., "Stats.," Sec. 131, p. 757; 5 Cal. Jur., "Const. Law," Sec. 46, p. 615; *Miller v. Municipal Court* (1943), 22 Cal. 2d 818, 142 P. 2d 297; *Shealor v. Lodi* (1944), 23 Cal. 2d 647, 145 P. 2d 574.)

There is no more justification for interpreting Sections 12 and 12a to prevent Federal savings and loan associations from using their corporate names or engaging in certain functions which the persons who happen to be in state political office at any time care to describe as "banking." The functions, by whatever name called, of the Federal reserve banks, of the Reconstruction Finance Corporation, of the Federal home loan banks, and of the Federal savings and loan associations, and the words used to describe those functions, are exactly those prescribed by the Federal government, no more and no less. An interpretation of Sections 12 and 12a that the sections do not apply to any one of these Federal activities would likewise result in their non-application to Federal savings and loan associations.

But Sections 12 and 12a of Act 652 and Sections 12.01 and 12.03 of Act 986, Deering's Cal. Gen. Laws, set out, *supra,* relate to the same subject, are *in pari materia* (*McGrath v. Kaelin,* 66 Cal. App. 41, 225 Pac.

34; *Nicolson Pavement Co. v. Painter,* 35 Cal. 699, 708), use similar and mutually complementary language, Sections 12, 12a and 12.03 (based on Stats. 1911, p. 607, Sec. 15)[3] are substantially contemporaneous, and all four should be "read and construed together, as one act, each referring to and supplementing the other * * *" (23 Cal. Jur., Stats., Sec. 163, and cases cited; also Sec. 166, and 10 Cal. Jur. Supp., Stats., Sec. 163) as "a single and complete statutory arrangement." (50 Am. Jur., Stats., Sec. 349.) Read and construed together, these sections are part of the general statutory scheme to prevent persons, whether California or foreign, who do not possess California certificates, from engaging in the financial operations to which the sections relate, and to regulate and supervise the persons to whom such certificates are awarded. If these sections apply to Federals, Federals cannot operate in California.[4] Such a result is entirely inconsistent with the several provisions of the same Act 986 (*e. g.* 12.11, 12.12) as well as Act 988 which clearly and unequivocally recognize the legality of Federal savings and loan associations in California. An interpretation of Sections 12 and 12a that would render these other provisions meaningless is not to be favored. (23 Cal. Jur., Stats., Sec. 133.)

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[3]See footnote 2, *supra.*

[4]Since Federal savings and loan associations are not building and loan associations as defined in Act 986, Section 1.02, they did not, at least until 1939, come within the exceptions of Sections 12 and 12a of Act 652 for building and loan associations. Act 988 (Stats. 1939, Chap. 525) provides in part that Federals and their members shall have all the rights of state building and loan associations and their members. However, Federals cannot operate under the State statutes (which provide for taking over by the State and have numerous provisions in conflict with Federal regulations for Federals) and so would be no better off now than they were before 1939.

**C. Consistently, California State Supervisory Statutes Have Been Administratively Interpreted as Not Applicable to Federal Savings and Loan Associations Since Federal Savings and Loan Associations Were First Authorized in 1933.**

From 1933 to 1950 there is no record of any attempt by California supervisors to regulate the regional Federal home loan bank or any Federal savings and loan association under an interpretation of Sections 12 and 12a.

One searches in vain through the extensive annual reports of the California Building and Loan Commissioner and the equally detailed reports of the California Superintendent of Banks from 1933 to the present date for any indication that any one of the several holders of these two responsible positions ever contemplated that a Federal savings and loan association, if legally in existence as such,[5] was subject to state supervision or regulation. On the contrary, while state control over "foreign" associations is repeatedly emphasized, Federals are inferentially conceded to be beyond state supervision in every annual report of the Building and Loan Commissioner. This was the history when, in 1949 and again in 1951, the California Legislature codified the two sections, retaining their basic language. The Legislature is not assumed to have ignored so long a history of administrative interpretation of the language it reenacted (*Riley v. Thompson*, 193 Cal. 773, 227 Pac. 772; *Nelson v. Dean* (1946), 27 Cal. 2d 873, 168 P. 2d 16, 21).

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[5]In the 42nd Annual Report of the Building and Loan Commissioner for the year 1935, p. 113, the legality of some conversions from state to Federal charter is questioned, and the constitutionality of the Federal system is incidentally discussed.

**D. California Statutes Clearly Contemplate That Federal Savings and Loan Associations Are Not Subject to State Regulation.**

As discussed, *supra,* interpreted as Appellants would have this Court interpret Sections 12 and 12a of Act 652, Section 12.01 of Act 986 would have prevented any Federal savings and loan association from doing business at all in California until 1939 (Act 988, Deering's Gen. Laws; Cal. Stats. 1939, Ch. 525) and even now would place on them the impossible condition that they carry on their business only in accord with Act 986, which includes provisions for the taking over of associations by the Building and Loan Commissioner.

Nowhere is there any indication of such a harsh attitude on the part of the State Legislature toward Federal credit agencies. The attitude of the Legislature, and its intention that none of its supervisory statutes apply to Federal savings and loan associations, is stated in so many words in Section 12.11 of Act 986:

> "At the time when such conversion (of a state association into a Federal savings and loan association) becomes effective * * * such association shall cease to be supervised by this state * * *."

See also definition of "securities" in Section 16.01.

And the California Courts have shown no different attitude. (See *Eddy v. Home Federal Savings and Loan Association,* 60 Cal. App. 2d 42, 140 P. 2d 156; and *H. O. L. C. v. Gordon,* 36 Cal. App. 2d 189, 97 P. 2d 845.)

## II.

## No Actions of the Defendant-Appellee Coast Federal Have Violated Any of the Statutes Set Forth in the Complaint.

### A. By Whatever Term That Field Is Described, the Appellee Coast Federal Has Transacted Its Business Strictly Within Its Lawful Field.

There were two witnesses at the trial, Witness Sparling, the Plaintiff Superintendent, in his own behalf, and the other Witness McMahon, on behalf of the Coast Federal. Witness McMahon set out in detail the manner in which the Coast Federal conducts its business [R. 210].

Any stranger entering the office of Coast Federal for the first time to place his savings with the Appellee receives either investment certificates in $100.00 amounts or a savings share account passbook [R. 210, *et seq.*]. In either event he must execute an application for membership in the "Coast Federal Savings and Loan Association of Los Angeles" [R. 212]. Both the certificate [R. 211, Ex. A] and the passbook [R. 211, Ex. B] clearly evidence the precise relationship between the investor and the Coast Federal. Nor is there any allegation that the forms are not those prescribed according to Federal regulation (24 C. F. R. 143.6 (1950 Supp., 145.2)). Also, the charter and by-laws of the Coast Federal are likewise made available to each new member [R. 217]. These, of course, clearly set out the form of organization [R. 217, Ex. E]. As against this direct showing the Appellants made no serious effort to sustain their allegation that, in violation of California statutes, the "defendant solicited and received deposits and transacted business in the way and manner of a bank and a savings bank * * *" [R. 16, Par. IV].

The District Judge found in part as follows:

> "No evidence was offered which would support a finding that defendant was actually transacting its business other than strictly within the limited perimeter of its expressly authorized field" [R. 108].[6]

This Finding of the District Court is not challenged in any way by the Appellants in their "Statement of Points Upon Which Appellants Intend to Rely and Designation of Record" [R. 236]. Nor in fact do the Appellants contend in their Opening Brief either that the District Court erred in so finding or that anything developed at the trial in any way that would have supported any contrary finding. No distinction is made in the Finding between Federal and state authority. Therefore, it cannot now be contended, in this appeal, that the Coast Federal has operated in any field other than that lawfully assigned to it, by whatever name called.

**B. No Advertising of the Coast Federal Would Have Violated Sections 12 or 12a if Applicable.**

For reasons set forth in the preceding part of this Brief, it is proper, by way of example, for this Appellee to call the funds entrusted to it "savings accounts" and for purposes of convenience to refer to itself on occasion by an abbreviation of its full name, as "Coast Federal Savings," regardless of what the provisions of Sections 12 and 12a are. These two sections were never intended to have any application to this Appellee. But even if these sections were intended to (which they were not) and constitutionally could (which they could not as is herein later

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[6]This sentence appears in the Opinion of the Court which was adopted as its Findings of Fact and Conclusions of Law [R. 135].

set forth) apply to Federal savings and loan associations, the judgment below should be affirmed in any event for the simple reason that nothing Coast Federal has done would be in violation of those sections.

It is apparent from the Complaint itself and from the testimony of the Appellant State Superintendent of Banks that over a period of many months he closely observed the advertising of the Coast Federal. Also, from the record and testimony as a whole it is clear that the Coast Federal, the largest local mutual thrift and home financing institution in the West and the largest Federal savings and loan association in the United States [*Savings and Loans News,* March, 1951, p. 36; R. 218, Ex. G], advertised extensively, and the Courts may judicially note that large financial institutions commonly advertise, using the normal media. The Appellant Superintendent of Banks has abandoned the charge in his Complaint that the Coast Federal unlawfully conducts a "banking business," in violation of California statutes, limiting his appeal to charges involving Coast Federal's advertising. It is significant that, out of the Appellee's fifteen years of extensive advertising the Appellant Superintendent has selected certain items, and we submit, has taken those items out of context, for his charges.

Witness Sparling, the Appellant Superintendent of Banks, testified that some time in December, 1948, the exact date of which he was uncertain, he heard a reference "to the banking office of Coast Federal Savings at 8th and Hill Streets, Los Angeles" in a radio advertisement of the Appellee [R. 200]. No attempt was made to prove that the particular broadcast was authorized by the Appellee. Witness Sparling stated that he wrote to

the President of the Appellee to complain about this supposed broadcast reference to "banking office." Mr. Sparling received a reply in which Coast Federal stated it had no knowledge that the term had been used in its advertising, but did not preclude the possibility that, "since there is no law against it and no misrepresentation," the term might have been included to "pad" an announcement in order to fill up the allotted time of a commercial on a small station [R. 202]. Witness Sparling conceded that to his "recollection" he heard such a reference only "once or possibly twice" [R. 203]. He could not identify the radio station or date [R. 198-199]. In their Brief, the Appellants state that it is "uncontradicted" that the Appellee referred to its place of business as "banking office" in its radio advertising. Quite to the contrary, with no more than the Appellant-Superintendent's vague recollection of an unidentified broadcast from an unidentified station the District Court did not and could not make a finding that the term was used, and the Appellants did not even see fit to include in their "Statement of Points Upon Which Appellant Intends to Rely" [R. 236] any allegation that the District Court erred in omitting such a finding.

In addition to the testimony of Witnesses Sparling and McMahon, there is in evidence a Stipulation executed by the parties for the purposes of trial [R. 93]. This Stipulation sets forth that on or about November 1, 1948, up to about March 1, 1949, the Appellee used certain signs in its windows. In one first-floor window was the legend "Coast Federal Savings" with the word "Coast" in large letters. In the next window separated from the first by a substantial tier of masonry were the words "Member

Federal Home Loan Bank" with the word "Bank" similarly emphasized. In other windows, all ground level and each likewise separated from the other by substantial tiers of masonry, were the legends "Federal Insurance," "Savings Accounts" and "Member Federal Home Loan Bank" with the words "Federal," "Savings" and "Bank" in larger letters than the other words. The Court below found in its Opinion adopted as its Findings [R. 135]:

> "Through emphasis upon certain words used in adjoining window signs, the very myopic would read, from a distance, 'Coast Federal Savings Bank.' Supervisory personnel of the Board saw such signs frequently. They were removed at the request of the Board about seven months before this action was commenced, but only after the Board received complaints, including those of the Superintendent. Thereafter, Defendant's signs recited that it was a 'Member of Federal Home Loan Bank,' without emphasizing the word 'Bank.'" [R. 108-109.][7]

The Stipulation also sets forth that the alleged overemphasis in these signs of the word "Bank" was discontinued about March 1, 1949, after it was called to the attention of the Appellee by the Appellant Commissioner and by a representative of the Home Loan Bank Board, the Federal supervisory body [R. 108, 94 *et seq.*, 204 *et*

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[7]Unlike a camera focused from a precise, distant vantage point, with the printed picture a miniature of the actual scene, a person walking on the sidewalk by the windows would be able to read the sign on only one window, and every word on that sign would be in large letters easily legible even to the "very myopic." See, for example, Exhibits A and B to the Complaint [R. 59, 60]. Even these exhibits necessarily reduce the size of the signs to a tiny fraction (compare size of passing persons) and are taken from a distance. In Exhibit B [R. 60] for example, the street trolley tracks are in the picture itself.

*seq.*]. The signs were always accurate. After about March 1, 1949, the signs used by the Defendants merely recited that it was a "Member of Federal Home Loan Bank" without emphasizing the word "Bank." The Complaint was filed on November 3, 1949. Referring to these signs, the Appellants say this Appellee has "clearly * * * violated the state law by overemphasizing the word 'Bank' in its building sign, by making its place of business appear to be 'Coast Federal Savings Bank.'" Again, however, the Appellants did not include any allegation in the "Statement of Points Upon Which Appellants Intend to Rely" that the District Court erred in its finding or that there should have been any further finding. The Federal statutes make the term "Federal Savings" the exclusive property of the Federal savings and loan system (18 U. S. C. 709; 12 U. S. C. 1464a, 1725g). There is no such thing as a "Federal Savings Bank." So, even the "very myopic" undertaking to read the ground level signs from a selected vantage point at "a distance" could not have been misled, and one does not transact business with a bank, or Federal savings and loan association, "from a distance" [R. 108]. Indeed, Appellant-Commissioner reluctantly conceded he did not know of a single case of a person who ever has been misled as to Appellee's nature or services [R. 207].

The same Stipulation contains statements concerning the "Coast Federal's Challenger," a quarterly publication of the Appellee. In general, the Appellee used the word "savings," the term "savings account" and in a single instance referred to "interest" on "your savings account." While "earnings" or "dividends" or "your interest in the earnings of the Association" may have been better terms

than "interest," there is no showing whatsoever that the Coast Federal, in even one instance, used the terms "notes" or "deposit," the essentials of any violation under Sections 12 and 12a. California building and loan associations lawfully use the term "interest" (*e. g.,* Sec. 8.09, Act 986, Cal. Gen. Laws). Sections 12 and 12a do not undertake to make the use illegal. The Commissioner-Appellant's Complaint [R. 12, Par. IV, R. 14] of the use of the very terms "savings account" and "savings" that are set forth in the Federal regulations and statutes (12 U. S. C. 1464, 1724; 24 C. F. R., 1950 Supp., 141.4, 145.1) graphically illustrates the dilemma in which all Federal savings and loan associations in California would find themselves if the Commissioner were able to extend his jurisdiction as he here attempts.[8]

The Appellee uses singing commercials in its advertising. However, the Appellee also awards a prize for the best letter on "Why I Hate Your Singing Commercial." The October, 1949, issue of its "Challenger" lists six winners of such prizes. The first winner listed "complained that her baby's first words were 'Cos Fed saves mo'—instead of 'Mama.'" [R. 42.] But it is to the award of the next such prize that the Appellant Commissioner complains. The winner of the next $25.00 prize was one Mrs. Mabel E. Smith, who made the rather startling suggestion that the Appellee use a "dignified slogan" in its singing commercials. Mrs. Smith gave an example of what she meant by a dignified slogan: "Our

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[8]Section 3394 of the Banking Code (Op Br. p. 11) forbids any *Bank* which has not received a certificate from advertising that it receives "savings." As discussed *supra,* this shows the legislative intention that the statutes were not intended to apply to federally chartered financial institutions.

business is banking; our banking is business. We solicit your banking business." While the record does not show whether the Appellee adopted the suggestion that it use a "dignified slogan" in its advertising, the parties have stipulated that the Appellee did not use the example given by Mrs. Smith, in its singing commercials or at all, except to the extent that the listing among the six award winners may be "use" [R. 98]. The page of the publication appears at R. 42. On the same page the words "Coast Federal Savings and Loan Association" are set out in such large letters as to be able to cover the fine print reference to Mrs. Smith's contribution. The page does not represent the Coast Federal to be anything but what it is, and no one could be misled by anything on it.

The Stipulation sets forth the use of the shortened term "Coast Federal Savings" in advertising. As discussed *supra,* statutes of the United States restrict the use of the words "Federal savings" to Federal savings and loan associations, and no other financial institution can use the term. Nothing in statutes or regulations forbids the use of the shortened description by Federals. In fact, the duly constituted Federal supervisors expressly and publicly recognize the practical necessity of the shortened descriptive custom (See The National Savings and Loan Journal, July, 1949, p. 6 *et seq.*), and the regulations themselves, rather than use the whole corporate name in each reference, repeatedly use "Federal association" (24 C. F. R., 1950 Supp., 141.2, *et seq.*). The Stipulation further contains, as an exhibit, a copy of an ad once published in a Los Angeles newspaper which contains the statement that a "Coast Federal Savings bank" will be given with each savings account, which "bank" is

to be an exact copy of the Coast Federal's office [R. 103]. The award of a penny bank copied after the Coast Federal's office is not a representation that the Coast Federal is other than a Federal savings and loan association.

## III.

## The Operations of Federal Savings and Loan Associations Are Subject to Federal Regulation Exclusively.

The opinion below should be affirmed without entering into the constitutional question. Since the opening brief of the Appellants concerns itself exclusively with the constitutional question, and since we believe it clear that no state could, if it wished, undertake the supervision of Federal savings and loan associations, the reasons for our view are, nevertheless, here set out.

### A. Congress, in Creating Federal Savings and Loan Associations, Directed and Intended That They Be Supervised Exclusively by the Federal Government.

1. Federal savings and loan associations were created to be instruments of the Federal government to accomplish specified constitutional purposes.

Federal savings and loan associations are authorized by Section 5 of the Home Owners Loan Act of 1933 (12 U. S. C. 1464). This was the second of the three major legislative enactments by which the Congress undertook to release the national savings and home credit structure from its frozen position of the early thirties and to establish the mechanism for its future progressive development. The first of these three enactments attempted in 1932 to create for the nation's savings and home financing

institutions a reserve credit structure roughly comparable to the Federal Reserve System that had existed for almost twenty years to the tremendous advantage of the nation's commercial banks. This was the Federal Home Loan Bank Act (12 U. S. C. 1421 *et seq.*). A year later, Congress passed the second of the enactments, that with which we are most directly concerned, the Home Owners Loan Act of 1933. Two major aspects of the then unfortunate situation in the thrift and home financing structure were met by this legislation. The first of these, the emergency then existing in which the principle of home ownership was more seriously threatened than at any time before or since in our history, was attempted to be alleviated by the creation of the Home Owners Loan Corporation. Solely an emergency and temporary device, this Corporation was assigned by the statute a brief period of active operation.

The second aspect of the serious situation of 1933, sought to be met by the Home Owners Loan Act of 1933, was the great need for a uniform national system of local mutual thrift and home financing institutions. This second aspect of the Home Owners Loan Act of 1933 was, accordingly, a long-range effort at basic structural alteration which has in the intervening years demonstrated itself to have been one of the most significant and successful undertakings in the financial history of the United States. The Congress directed the Home Loan Bank Board, an agency of the United States, to establish a uniform system of local mutual thrift and home financing institutions throughout the country "in order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing

of homes," to be known as "Federal savings and loan associations" (12 U. S. C. 1464). It is difficult nineteen years later to recreate in our minds the situation that then confronted the Congress, but perhaps it is possible by looking back to recall the position of those persons who at that time desperately needed and could not get loans to retain their family homes, the market value of which had suddenly and almost hopelessly deflated but which still served for them and their families the same functional purpose that homes served before market conditions changed.

The third of the major congressional enactments that were intended to correct the then existing situation was Part IV of the National Housing Act of 1934. This legislation created the Federal Savings and Loan Insurance Corporation, the duty of which would be to insure the savings accounts of all Federal savings and loan associations, and which corporation was given the option of insuring the savings in specific other thrift and home financing institutions (12 U. S. C. 1724 *et seq.*).

Accordingly, the functions assigned by Congress to Federal savings and loan associations are the promotion of thrift and home financing, and certain other functions as fiscal agents of the United States (12 U. S. C. 1464(a) and (k)). A board appointed by the President with the advice and consent of the Senate is directed to provide for their "organization, incorporation, examination, operation and regulation." The United States Government extended funds to these newly created instrumentalities in order to give them the impetus to perform their congressionally assigned functions. This investment by the government was authorized to the extent of three dollars for every dollar of private savings entrusted to the particular

association (12 U. S. C. 1463(n), 1464(g) and (j)). The extent of exemption from taxation has been specific (12 U. S. C. 1464(h)). See also 26 U. S. C. Sections 101, 104. One hundred million dollars additional of Government money was advanced as the initial capital of the Federal Savings and Loan Insurance Corporation (12 U. S. C. 1725).

Obviously, Federal savings and loan associations are performing functions assigned by Congress in the promotion of thrift and home financing, and for purposes of fiscal agency. They have accordingly been held to be "instruments" or "instrumentalities" for this purpose. (*Federal Savings and Loan Insurance Corporation v. Kearney Trust Co.,* 8 Cir., 151 F. 2d 720, 725; *North Arlington National Bank v. Kearney Federal Savings and Loan Association,* 3 Cir., 187 F. 2d 564; *First Federal Savings and Loan Association v. Loomis,* 7 Cir., 97 F. 2d 831, 121 A. L. R. 99, cert. dism. 305 U. S. 666; *Community Federal Savings and Loan Association v. Fields,* 8 Cir., 128 F. 2d 705; *First Federal Savings and Loan Association v. Danahar,* 128 Conn. 78, 20 A. 2d 455, 463-464 (1941); *State v. Minn. Federal Savings and Loan Association,* 218 Minn. 229, 15 N. W. 2d 568 (1944).)

Regardless of whether we call these associations "instrumentalities," their operation is an activity the regulation of which Congress could preempt. The important consideration is not the label "instrumentality," but the fact that Congress has expressly preempted the entire field to the exclusion of state supervision and regulation.

2. Congress preempted the entire field of supervision and control of Federal savings and loan associations.

The plenary delegation by the Congress to the Home Loan Bank Board is in the most general and all-inclusive

of terms. The Congress delegated to the Home Loan Bank Board supervision and control over all operations of Federal savings and loan associations, such supervision and control to be exercised on a uniform national basis (12 U. S. C. 1464). It is difficult to conjecture more enveloping words than those of 5(a), "organization, incorporation, examination, operation and regulation" and the issuance of charters. In this respect, unlike national banks which are chartered by Congress, and unlike any other corporations which may receive their existence pursuant to general incorporation statutes, Federals look to an agency of the Executive Branch of the government for their corporate existence, which agency in turn has derived its authority from this exhaustive delegation. (*Keifer and Keifer v. Reconstruction Finance Corporation,* 306 U. S. 381, 392; *North Arlington National Bank v. Kearney Federal Savings and Loan Association,* 3 Cir., 187 F. 2d 564; *Federal Savings and Loan Insurance Corporation v. Kearney Trust Co.,* 8 Cir., 151 F. 2d 720; *cf., Fahey v. Mallonee,* 332 U. S. 245.)

The Board, in turn, has regulated all aspects of the creation, operation and corporate life of Federal savings and loan associations. Federal savings and loan associations operate under detailed regulations and instructions prescribed by the Home Loan Bank Board. These regulations are found in 24 C. F. R., Sections 141 *et seq.* In addition, by reason of the fact that the law requires that all accounts in Federal savings and loan associations be insured by the Federal Savings and Loan Insurance Corporation, these Federal associations are likewise subject to these additional regulations of the Home Loan Bank Board which appear in 24 C. F. R., Sections 161, *et seq.* The District Court, having looked at the

Board's regulations, was impelled to comment: "The Board has adopted extensive rules and regulations concerning the powers and operations of every Federal savings and loan association from its cradle to its corporate grave" [R. 111].

**B. Any Attempt by States to Regulate or Supervise Federal Savings and Loan Associations Must Necessarily Be an Unconstitutional Inference With the Federal Government.**

The Appellants' Opening Brief in this connection contends:

(1) That Federal savings and loan associations are not instrumentalities of the United States (Op. Br. 15), and that cases (Op. Br. 22 *et seq.*) which say so as a matter of fact do not so hold.

(2) That railroads created in specific acts of incorporation by Congress, or persons performing services for a government, may, nevertheless, be subjected to taxation (Op. Br. 16).

(3) That a state-chartered building and loan association which is a member of the Federal Home Loan Bank System is not thereby exempt from state taxation (Op. Br. 18).

(4) That a private insurance corporation owning stock in a Federal Home Loan Bank may, nevertheless, be subjected to state taxation (Op. Br. 20).

(5) That property of a government instrumentality may not be immune from attachment (Op. Br. 21).

This is not a case involving taxation. If it were, it would be decided on the basis of the specific Federal statutory provisions that govern the taxation of Federal savings and loan associations. (See 12 U. S. C. 1464(h).)

Accordingly, we see no reason to enter into a discussion of the extent to which Congress has subjected Federals to taxation. Likewise, this is not a case involving an attachment of property. Federals are "sue and be sued" corporations [24 C. F. R., 1950 Supp., 144.1; R. 217, Ex. E] and may eventually be held to be subject to various incidents of litigation, but that too is a matter of Congressional intent.[9] Certainly, we do not contend that any state chartered building and loan association, an instrumentality of a state which, with the consent of its sovereign, happens to be a member of a Federal Home Loan Bank, is in any way removed from the control of the state for tax, supervisory, or other purposes, by becoming such member.

The question here is one of Federal or state supervision and regulation of the every day operations of a Federal savings and loan association. As we have seen, the exclusive authority to create and regulate a uniform system of Federal savings and loan associations has been delegated by the Congress to the Home Loan Bank Board.

Accordingly, the operations of these associations must be controlled by Federal, not state, law.

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[9]See, however, *Van Reed v. People's National Bank,* 198 U. S. 554, 557, in which the Supreme Court said, in holding that there could be no state court attachment of national banks (198 U. S. at 557):

> "* * * National banks are quasi-public institutions, and for the purposes for which they are instituted are national in character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit. * * *."

In ruling with respect to the Liberty Federal Savings and Loan Association of Liberty, Missouri, the Eighth Circuit Court said:

> "If this were not true the consequences resulting from the violation of statutory prohibitions enacted by Congress for the protection of these national institutions would be subject to conflicting local laws unrelated to the uniform purpose of the Acts." (*Federal Savings and Loan Insurance Corporation v. Kearney Trust Co.,* 8 Cir., 151 F. 2d 720 at 725; see also *Eddy v. Home Federal Savings and Loan Association,* 60 Cal. App. 2d 42, 140 P. 2d 156.)

That decision of the Eighth Circuit with respect to Federal savings and loan associations is consistent with the general principle that "the national purpose to establish uniformity necessarily excludes state regulation" (*International Shoe Co. v. Pinkus,* 278 U. S. 261, 265) and with the further principle that when Congress intends that a field of regulation within the Federal Government's authority be occupied exclusively by the Federal Government, regulations of the state in that field are of no force or effect (*Amalgamated Ass'n v. Wisconsin Bd.,* 340 U. S. 383).

The Congressional mandate of a uniform system of Federal savings and loan associations would be nullified by the application of state supervision.

The defendant Federal savings and loan association is operated as one unit in a system of more than 1500, in accordance with the Congressional mandate, under uniform standards prescribed for the conduct of its business as well as for its creation (*Federal Savings and Loan Insurance Corporation v. Kearney Trust Co., supra*). Once state statutes are applied to regulate these operations, to

that extent a Federal must conduct or advertise its business differently than the Federal savings and loan associations in another state. Historically, there is sound basis for the rule of uniformity for, while local mutual thrift and home financing institutions "have proved to be the most economically conducted financial institutions in the world, and have, generally speaking, suffered the least financial loss," organizations have sometimes come into existence which have not been established along "the same sound principles" to the confusion of the small saver (*White v. Wogaman*, 54 P. 2d 793, 796, 798, 47 Ariz. 195). It cannot be expected that every person become a legal and financial expert before placing his small savings with a particular financial institution. Now that Federal savings and loan associations have become widely known over the country as uniform local mutual thrift and home financing institutions, their sound, economical operations and the standard terms used to describe their uniform operations have become familiar to millions of savers and home-owners. This is, indeed a most valuable factor in the tremendous public confidence that these institutions have engendered.

But, nevertheless, regardless of its merits or demerits, uniformity is a prescription of Congress which must be respected.

**C. As a Matter of Fact, the Contentions of the Plaintiffs, in This Action, Would if Sustained Frustrate the Purposes of the Home Owners' Loan Act of 1933, and Discriminate Against Federal Savings and Loan Associations to the Advantage of Competing State Instrumentalities.**

In the case of national banks, the courts have held that Congress established a system whereby the individual instrumentalities would exercise the powers set out in the

legislation subject to state laws that did not discriminate against them, or hamper their operations, or conflict or interfere with Federal law or supervision (*Easton v. Iowa First National Bank,* 188 U. S. 220; *First National Bank v. California,* 262 U. S. 366; *Missouri, ex rel. Burns National Bank v. Duncan,* 265 U. S. 17; *Anderson National Bank v. Luckett,* 321 U. S. 233). In this respect the National Banking Act differs from the Home Owners' Loan Act which, as we have just discussed, makes a plenary delegation to the Home Loan Bank Board, from which in turn the Federal associations derive their powers.

But even by the standards applied to state legislation undertaking to regulate the activities of national banks, Sections 12 and 12a could not operate against Federal savings and loan associations.

The Appellants' Opening Brief (Op. Br. 26) discusses *State v. Peoples National Bank,* 75 N. H. 27, 70 Atl. 542, stating that the case "held that a national bank was subject to the state law providing that no person shall advertise or hold itself out as a savings bank except a savings bank incorporated in the State of New Hampshire." The most casual reading will demonstrate that is not the holding of this case, but rather that the Court expressly refrained from ruling on that point.

*Anderson National Bank v. Luckett,* 321 U. S. 233, holds that a state escheat statute neither discriminates against nor imposes any burden upon national banks. Indeed, it is difficult to conceive how the substitution of itself by the state as the holder of a dead account could be a burden on the bank (*Roth v. Delano,* 338 U. S. 226). But the opinion rests on the non-discrimination and lack of burden.

When the state legislation is of the type here involved, there is both burden and discrimination.

In *People v. Franklin National Bank,* 105 N. Y. S. 2d 81 (1951), the National Bank objected to a state statute that forbids banking institutions, except mutual savings banks and savings and loan associations, to advertise that they receive "savings." The Court recognized that commercial banks, particularly those with savings departments and including national banks, were in competition with savings and loan associations and mutual savings banks. Although national banks were treated equally with their opposite state numbers, this discrimination in favor of savings and loan associations was held to be sufficient to invalidate the state statute. In fact, even the attempt by a state to impose a penalty on a national bank for doing exactly what it is forbidden to do under Federal law is invalid, for if the Congress wanted to impose sanctions, it would do so (*Lauer v. Bayside National Bank,* 244 App. Div. 601, 280 N. Y. Supp. 139 (1935); see p. 6 *et seq.,* U. S. *Amicus* brief).

Federal savings and loan associations do not compete only, or even principally, with state building and loan associations. Federals are modelled after the "best practices" of mutual savings banks, cooperative banks, mutual savings and loan associations and other local mutual thrift and home financing institutions in the United States and not those of any one state (12 U. S. C. 1464). But Federals may exercise only the uniform powers given them by Federal authority. The Plaintiffs, however, would say to Federals that they may exercise only such of these powers as California may also happen to have given state building and loan associations. Since Federals are not replicas of California building and loan associations, the

Federals may need certain powers not given to the state institutions, while state statutes undertaking to give them certain powers that state building and loans have (*e. g.,* the authority to issue interest-bearing investment certificates) would be useless to Federals in view of their corporate structure (12 U. S. C. 1464a, b) so that Federals would be at a competitive disadvantage even with state building and loans. However, Federals compete for savings and for home mortgages with state commercial banks. They do not do "a general banking business" but "do some of the things which banks do, obviously" (*North Arlington National Bank v. Kearney Federal Savings and Loan Association,* 3 Cir., 187 F. 2d 564, at page 567). Accordingly, the attempted imposition by the state, as distinguished from the Federal Government, of competitive disadvantages with respect to these institutions would also be unconstitutional discrimination even if the state imposed the same or similar disadvantages on its own building and loan associations (*People v. Franklin National Bank,* 105 N. Y. S. 2d 81 (1951)).

The policy of the California state supervisory statutes is illustrated by the fact that $603,902,370.86, out of a total of $640,563,300.96 of all assets held by California chartered building and loan associations are held by capital stocks as distinguished from no-capital-stock mutuals. (Taken from Detailed Statement of Condition of Each Building and Loan Association in California, Table 6, 57th Annual Report of the Building and Loan Commissioner, for the Year Ending December 31, 1950.) Mutual savings banks are not common in California. See 41st Report, Superintendent of Banks, as of the close of June 30, 1950.

The state supervisors recognize that there is a "basic difference" between capital stock building and loans and mutual building and loans. (55th Annual Report of the Building and Loan Commissioner, for the Year 1948, p. 12.) Actually, "at first, all building and loans in California operated on a mutual plan. Later, a different method was developed in California which became known as the guarantee plan * * * under which most of the California associations function * * *." (41st Ann. Report, Building and Loan Commissioner, for the Year 1934, p. 125.) This development was under analysis by the *Report of the Select Committee of the Assembly for the Purpose of Investigating the Building and Loan Situation in the State of California,* which is set forth in the 41st Annual Report of the Commissioner, *supra.*

California may be wise in encouraging the capital stock form of organization rather than the mutual in this field. That is a purely political decision reserved "to the political departments of the government, Executive and Legislative." (*Chicago & S. Air Lines v. Waterman Corp.,* 333 U. S. 103, 111.) It is not for the Federal government or the Federal courts to criticize California State policy. There is no need to enter into a discussion of which policy is wiser, the State or Federal. Neither has the right to inflict its regulations on the others, or to subject the instrumentalities of the other to a cross-fire.

In particular, it is not for the State of California to decide whether or not Federal savings and loan associations may be referred to as "banks" or "banking institutions."

As we have seen, Federal savings and loan associations are modeled after "the best practices of local mutual

thrift and home financing institutions in the United States," and while they do not do "a general banking business," do "some of the things which banks do, obviously." (*No. Arlington National Bank v. Kearney Federal Savings and Loan Association, supra,* at p. 567.) In the State of New York, for example, are many mutual savings and loan associations which are quite prosperous, and successfully compete with commercial banks and other capital stock financial corporations. These mutual savings and loan associations are specifically referred to in legislation as "banking organizations." (4 Pt. 1 McKinney's Laws, Sec. 2(11).) One of the outstanding types of thrift and home financing institutions in Massachusetts is the "cooperative bank." Analytically, the corporate structure of cooperative banks is very similar to that of Federal savings and loan associations (5 A *Ann. Laws,* Mass., Ch. 170, Sec. 1, *et seq.*), and they are officially called "banks." (5 A *Ann. Laws,* Mass., Ch. 167, Sec. 1.) These cooperative banks are prosperous and successfully compete with other financial institutions.

But it is not only in the Northeast that local mutual thrift and home financing institutions, including savings and loan associations, are commonly referred to as "banks." In the leading case on the delegation of authority over Federal savings and loan associations by the Congress to the Home Loan Bank Board, the United States Supreme Court used "banking" (p. 250), "banking enterprise" (p. 250), "state and Federal banking statutes" (p. 253), "history and customs of banking" (p. 254), and "public banking business" (p. 256), all in reference

to Federal savings and loan associations. (*Fahey v. Mallonee,* 332 U. S. 245.)[10] Recently, thrift and home financing institutions generally have been classified as "banks" in the Federal revenue statutes. (26 U. S. C. 104.) Whether Federal savings and loan associations should, or should not, refer to themselves as "banking institutions" is for determination by Federal authorities, according to a uniform national rule.

Apart from "bank" and "banking business," the Complaint of the Plaintiffs seems mostly concerned with the term "savings" and "savings account" [R. 11, *et seq.*]. In New York, where local mutual thrift and home financing institutions are prosperous and numerous, the statute prescribes that only savings and loan associations and mutual savings banks may advertise that they receive "savings," and that other banks may not (4 Pt. 1 *McKinney's Laws,* Sec. 258). It is not for the Courts to say whether the policy of California or New York is right, but in turn, neither New York or California may inflict its limitations on one form or the other of Federal financial institutions. See *People v. Franklin Savings Bank,* 105 N. Y. S. 2d 81, the corollary of the case at bar.

The question is one of major concern to Federal savings and loan associations.

The question of the application of Sections 12 and 12a, and of the applicability generally of state supervision, to Federal savings and loan associations is a grave and serious one to the associations.

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[10]This is not a matter of careless use of terms by the Supreme Court. It is precisely the fact that a *banking business* was involved on which the decision rested. See *Davis, Administrative Law* (West, 1951), Sec. 44, p. 155, *et seq.,* and also other discussions of *Fahey v. Mallonee* at pages 52 and 260.

The Federal Government says in its Brief that institutions such as this Defendant need to advertise "savings" in order to perform their functions (Gov. Brief p. 23. See also Speech of the Chairman of the Home Loan Bank Board, p. 6, *et seq.* of the July, 1949 issue of the National Savings and Loan Journal, for the position of this Defendant's Federal supervisors). Regardless of whether the Federal supervisors are right, this Defendant is bound on the penalty of powerful sanctions to operate as these supervisors decide. Supervisory criticism and supervisory action can reasonably be expected to follow as quickly from any omission to perform the functions assigned by statute as they would follow an improper performance of these functions. Before it can obtain a charter, each Federal savings and loan association must demonstrate the probability of its usefulness and success (12 U. S. C. 1464(e); 24 C. F. R., 1950 Supp. 143.2).

## IV.

## Primary Jurisdiction to Determine Under the Home Owners' Loan Act of 1933 What Are the Best Practices of Local Mutual Thrift and Home Financing Institutions in the United States Rests in the Home Loan Bank Board.

It is unchallenged that the Appellee at all times transacted its business strictly within the limited perimeter of its expressly authorized field [R. 108]. Accordingly, we do not have a case before us of a Federal instrumentality that attempted to perform functions not assigned to it by the Federal authorities. Since the Appellee was acting within its lawful field, the question of whether or not it properly acted depends on whether or

not what it did is in accord with the statutory test of "best practices" as interpreted by the Home Loan Bank Board in its regulations, for if the actions complained of are among those prescribed by the Federal law, they could not be prohibited by state statutes. (See Part III, *supra.*)

The Home Loan Bank Board is charged by statute with the exclusive authority and responsibility to make the initial determination of whether or not the operations of Federal savings and loan associations are in accord with "best practices." This responsibility having been vested in the Board, the courts will respect the statute and permit the Board to make such initial determinations (*North Arlington National Bank v. Kearney Federal Savings and Loan Association* (3 Cir.), 187 F. 2d 564).

The Congressional direction that the Board regulate according to the best practices of local mutual thrift and home financing institutions in the United States requires a knowledge of facts that "can only be known to an official or a body having wide experience in such matters and ready access to the means of information." (*Williamsport Wire Rope Co. v. U. S.,* 277 U. S. 551, 561.) Whether or not Federal savings and loan associations should be permitted to refer to themselves as "banking institutions," whether they should call the investments they offer "stock," "shares," "savings," or "savings accounts," whether they should maintain a high or low percentage of liquid assets with the related question of whether they should advertise that money invested in them is available when wanted, how aggressive their advertising campaign for savings or mortgage loans or both should be, must all be determined in the first instance by

the Home Loan Bank Board according to the "best practices" standard and in accord with the national fiscal and financial policy of the particular time. Such matters are "delicate, complex, and involve large elements of prophecy." (*Chicago and South. Airlines v. Waterman Steamship Corp.*, 333 U. S. 103, 111.) They are administrative, not judicial, decisions.

If there is any merit to any charges that may be made against any Federal savings and loan association, the courts must assume that the Home Loan Bank Board will correctly and properly handle the matter when it is presented to it. (*Fahey v. Mallonee, supra.*) We are not now concerned with the extent of judicial review after the Board has so acted, but no court has the jurisdiction to make the initial administrative determination of whether the operations of any Federal savings and loan association, which operations are conceded to be within the strict perimeter of its assigned field, are or are not in accord with the "best practices of local mutual thrift and home financing institutions in the United States." The Court below correctly held that primary jurisdiction is in the Home Loan Bank Board.

## Conclusion.

It is, therefore, respectfully submitted that the judgment of the District Court be affirmed.

Respectfully submitted,

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